PREVAILING FACTOR & THE SECONDARY INJURY RULE

Perez v. Nat'l Beef Packing Co., __ Kan. App.2d ___, ___ P.3d ___ (Kan. Ct. App. 2021)

Holding: 1) The prevailing factor test and the secondary injury rule work in tandem. A secondary rule must be both the natural and probable consequence of the primary injury and be caused primarily by the work accident. 2) K.S.A. 44-508(f)(2) is constitutional. 3) The Board is not bound by technical rules of procedure, and as the *Guides* are mandated as the starting point when determining a claimant's functional impairment, the Board may take judicial notice of them at its discretion.

Facts: Perez sustained an injury to his left knee when he tripped and fell over a drain cover at work. Twenty years prior, he had injured his left knee and underwent a partial lateral meniscectomy, but he experienced no lasting problems.

Despite the earlier injury and surgery, Dr. Guillermo Garcia performed a new meniscectomy on Perez's left knee. After the procedure, Perez experienced pain, swelling and instability. Consequently, Dr. Garcia recommended Perez undergo a total knee replacement; he also opined Perez's workplace accident was the prevailing factor for his condition.

Dr. Pedro Murati evaluated Perez at claimant counsel's request. Dr. Murati opined Perez had suffered a horizontal tear of the posterior horn and medical meniscus. While he noted Perez's prior accident and pre-existing degenerative joint disease, he felt claimant's workplace accident was the prevailing factor for his left knee injury, need for a total knee replacement, and 19% functional impairment to the left lower extremity.

Dr. Kenneth Jansson evaluated Perez. He agreed Perez needed to undergo a total knee replacement. But he opined, "[the] injury [Perez] suffered 20 years earlier with a subsequent resection of his meniscus was the prevailing factor for his advanced degenerative arthritis." This degenerative condition, and Perez's need for a total knee replacement were not directly related to his workplace accident.

Dr. Daniel Gurba served as a court-ordered IME physician. Like Dr. Jansson, Dr. Gurba opined Perez's osteoarthritis and prior knee injury were the prevailing factor for his need for a total knee replacement.

The ALJ and Board concluded Perez workplace accident was not the prevailing factor for his need for a total knee replacement. Rather, the requested medical treatment was due to Perez's prior injury and pre-existing, degenerative condition. Nevertheless, they awarded Perez a 16% functional impairment to the left lower extremity, leg level. In reaching this opinion, the Board inspected the *AMA Guides* to determine Perez functional impairment.

Issue: 1) Did the Board properly apply the second injury rule, when it concluded his workplace accident was not the prevailing factor for the total knee surgery? 2) Is K.S.A. 44-508(f)(2) constitutional because it deprived Perez of a remedy? 3) Did the Board err when it reviewed the *AMA Guides*, which were not in evidence, to determine claimant's functional impairment?

Analysis: The Court of Appeals ruled the prevailing factor tests operates in conjunction with the secondary injury rule. Thus, looking to *Buchanan v. JM Staffing, LLC,* 52 Kan.App.2d 943 (2016), the court held, "all injuries, including secondary injuries, must be caused primarily by the work accident." In Perez's case, the evidence established his prior accident led to the development of osteoarthritis and bone-on-bone condition in his knee, not his workplace accident. Therefore, he could not establish the workplace accident with National Beef was the prevailing factor for his need for a total knee replacement.

The Court further rejected Perez's constitutional arguments. It observed Perez could have recovered for a total knee replacement had the ALJ and Board accepted the opinions of Drs. Garcia and Murati. Hence, Perez had an opportunity to recover benefits he requested; he failed to do so because he did not carrier his burden of proof, not because the remedy had been so emasculated as to be non-existent.

As a final matter, the Court rejected National Beef's argument that the Board looked outside the record when it consulted the *AMA Guides* to determine Perez's impairment. The Court observed the Workers Compensation Act mandates physicians start with the *Guides* when determining impairment. Furthermore, neither the ALJ nor the Board is bound by technical rules of procedure, so the Board was allowed to consult the *Guides* when determining Perez's impairment rating. Furthermore, the *Guides* are adopted by law and set forth as the starting point when determining a claimant's functional impairment. Accordingly, the Board may take judicial notice of the *Guides* at its discretion.

CONSTITUTIONALITY

Johnson v. U.S. Food Serv., 312 Kan. 597, 478 P.3d 776 (2021).

Holding: The 2013 Kansas Legislature's amendment to K.S.A. 2019 Supp. 44-510e(a)(2)(B) did not remove the requirement that the percentage of functional impairment be established by competent medical evidence.

Facts: Johnson injured his spine while working for U.S. Food Service. Dr. Hess inspected his injury and found that Johnson had herniated discs affecting his spinal cord function. Dr. Hess recommended Johnson have surgery immediately. Johnson filed for worker's compensation. Dr. Hess continued to monitor Johnson during his post-surgery recovery. Once Johnson reached maximum medical improvement, Dr. Hess rated Johnson as 6% of the whole person impaired by using the *6th Edition*.

Johnson appealed. The Court of Appeals found that the language which adopted the *6th Edition of the AMA Guides* eliminated using the percentage of functional impairment to determine an employee's injuries and thus is less effective and no longer adequately supports injured workers who suffer a permanent impairment as a result of an injury occurring on or after January 1, 2015. The Court of Appeals remanded the case to the Administrative Law Judge to conduct further proceedings regarding Johnson's claim to use the *4th Edition* of the *AMA Guides.*

Issue: Is the Kansas Legislature's inclusion of the *Sixth Edition of the American Medical Association Guides* unconstitutional under section 18 of the Kansas Constitution's Bill of Rights?

Analysis: The Kansas Supreme Court reversed the Court of Appeal's holding, finding that the language added in 2013 does not change the essential legal standard for determining functional impairment. "K.S.A. 2019 Supp. 44-510e(a)(2)(B) still requires that ratings be established by competent medical evidence." The Court found that because there were two competing, reasonable interpretations of the added language, the Court had a duty to construe the statute as constitutionally valid. The substance of K.S.A. 2019 Supp. 44-510e(a)(2)(B) remains the same, and thus the challenge under section 18 of the Kansas constitution Bills of Rights fails.

Zimero v. Tyson Fresh Meats, No. 122,905, 2021 Kan. App. Unpub. LEXIS 416, 2021 WL 3046519, (Kan. App. July 16, 2021) (unpublished opinion).

Claimant reported a work injury to her shoulders, right arm, and upper back in 2016 while working for the respondent and using an electric whizard knife. She was moved into a light duty position. She was treated by Dr. Do, given injections, and released with a 0% impairment. The claimant was then evaluated by Dr. Vito Carabetta as a court-ordered neutral evaluation. In his report, Dr. Carabetta noted that the claimant's condition would normally warrant a 2% impairment under the 6th Edition, he increased the value to 3% based on her physical examination. The Board awarded 3% body as a whole impairment based upon the report. The claimant appealed, and the Board affirmed the ALJ's award. Claimant appealed.

The claimant argued that the Board erred in not considering the 4th Edition impairment and, in effect, mandating the use of the 6th Edition of the Guides. The claimant argued this violated the decision in *Johnson II* mandating the use of the 6th Edition to be a 'starting point' requiring proof by competent medical evidence to support the final impairment rating.

Noting that the parties appeals in workers compensation matters are limited to issues raised before the Board, and that the Board only has authority to review "questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, and introduced before the administrative law judge", the court reviewed the proceedings and found that the claimant had challenged the exclusion of the claimant's bilateral carpal tunnel syndrome, but not necessarily the sufficiency of the underlying 3% rating. Therefore, the court could have declined to entertain the issue. However, because the *Johnson II* may constitute a change in the controlling law, he addressed the merits of this claim.

The court found that any reference to the 4th Edition to the Guides occurring after January 1, 2015 is *irrelevant.* Specifically, it noted that *Johnson II* had given guidance that the 6th Edition was a starting point, and while the rating must still be supported by substantial evidence to adjust the impairment rating, the current law does not allow choosing between the editions of the Guides. Therefore, the court found that the rating supplied by Dr. Carabetta, including the 1% increase and deviation, was supported by competent medical evidence and affirmed the decision by the Board.

Van Horn v. Blue Sky Satellite Servs., No. 122,888, 2021 Kan. App. Unpub. LEXIS 424, 2021 WL 3124167 (Kan. App. July 23, 2021) (unpublished opinion).

Claimant worked for the respondent in the position of an installer when he suffered an injury in March of 2018 when his knee popped while ascending stairs in a customer's home. He was diagnosed with a medial meniscus tear, as well as degenerative conditions in his knee. He was sent to urgent care, and eventually to an orthopedic surgeon, who performed a partial medial meniscectomy with chondroplasty. In the operative report, arthritic changes in the claimant's knee were noted throughout. The claimant was off work from March 15 to June 21, 2018, when the claimant was released at full duty.

The claimant testified that he was not seeking any further medical treatment, that he had returned to work at his previous job, that though his knee was not at full strength, it was improved when compared to before the procedure, that he still had occasional swelling and pain in the knee, and that he had not suffered any loss of movement as a result of the injury. Dr, Zimmerman provided a 3% rating under the 6th Edition of the Guides and a 20% rating under the 4th Edition. Dr. Samuelson provided a 2% rating under either edition of the Guides. The ALJ awarded a 3% impairment, noting that if the 4th were utilized, the ALJ would have awarded an 11% impairment. Further, the ALJ denied future medical benefits. The Board affirmed the impairment, but reversed on the issue of future medical benefits. Claimant appealed, Respondent cross-appealed.

The first issue addressed was the constitutionality of K.S.A. 44-510(B)(23-24). Claimant argued that the mandated use of the 6th Edition of the Guides rendered the statute unconstitutional because it fails to provide an adequate substitute remedy. Respondent argued that the determination is irrelevant because some evidence showed that the impairment would be the same regardless of the edition utilized. Ultimately, the court found that the claimant did not adequately follow Supreme Court Rule 6.09, which requires a litigant to brief and support all of the issues it wants the court to consider. Citing *Hoskinson v. Heiman,* No. 122,120, 2021 WL 2282668 at *3 (Kan. App. 2021) (unpublished opinion), the court found that because the issue was not adequately briefed, it would place the judiciary in the role of counsel and force the court to decide the case on additional research which it would have to conduct. They declined to do so, and found that the failure to adequately brief the issue resulted in an abandonment of the issue.

Second, the court looked to whether the underlying ALJ's decision was supported by substantial competent evidence. The claimant argued that any rating under the 6th Edition lacks the evidentiary foundation needed to be considered. Because the constitutionality argument was not able to be addressed, the court was unable to grant the remand with instructions to consider the 4th Edition that was requested by the claimant.

Third, the court considered whether the ALJ and the Board should have found that the claimant's injury was a result of a normal day-to-day activity, and therefore non-compensable under the act. The court examined *Johnson v. Johnson County*, 36 Kan. App. 2d 786, 790, 147 P.3d 1091 (2006), *Martin v. USD No. 233*, 5 Kan. App. 2d 298, 615 P.2d 168 (1980), and *Anderson v. Scarlett Auto Interiors*, 31 Kan. App. 2d 5, 61 P.3d 81 (2002). All of these cases

were decided prior to the 2011 amendments. The court found that the common thread between the cases cited above was that the claimants all had a "…medical history specifically related to the injury at issue." They found that the respondent did not point to any evidence that the claimant had prior complaints to the knee. Although the respondent's rating doctor (Samuelson) had pointed to degenerative changes in the knee pre-dating the injury, his report stated specifically that the claimant had no prior difficulties. Therefore, the court found that the respondent's own evidence supported a finding that the injury was compensable.

Further, the court noted the claimant's burden was to establish that it was more likely than not he was climbing the stairs in the course of, or in furtherance of, his work duties. It also noted that while the claimant may climb stairs at his house, many activities that are done at home can also be job-related (citing to *Netherland v. Midwest Homestead of Olathe Operations*, No. 119,873, 448 P.3d 497, 2019 WL 4383374, at *11-12 (Kan. App. 2019 and *Munoz v. Southwest Medical Center*, No. 121,024, 2020 WL 1313794 at *7 (Kan. App. 2020). Ultimately, the court found that ascending the stairs with the increased weight of the toolbelt was sufficient competent evidence to support the Board's decision and found in favor of the claimant.

Next, the court was asked whether to determine whether the Board made a factual error in determining that the claimant was entitled to future medical. The main focus of the analysis was spent dissecting the opinion of Dr. Samuelson, who did attribute a need for future medical, but only for the underlying degenerative changes. However, the testimony from Dr. Samuelson that the claimant did not suffer a work injury at all proved fatal to this determination. The claimant's physician (Zimmerman) had determined that he had indeed suffered a work injury, which the court agreed with, which lead to credence given to his opinion that future medical was necessary for that work injury. Therefore, the Board's decision was supported by competent medical evidence and the claimant retained the right to future medical treatment.

The respondent asked the court to review the award of TTD for March 15, 2018 through June 21, 2018. Because of the above decisions, the court declined to address this argument further and upheld the award of benefits.

Last, the respondent challenged the Board's award of payment for past medical benefits. The claimant argued that the respondent is liable because the respondent knew about the injury and refused or neglected to reasonably provide the services of a health care provider. K.S.A. 44-510j(h) provides the employee with a remedy if the employer fails to carry out the duty imposed by 44-510h(a) to provide medical treatment. The claimant contacted the respondent immediately after he was injured and the respondent directed him to go to urgent care. Citing controlling precedent from *Saylor v. Westar Energy, Inc.,* 292 Kan. 610, P.3d 828 (2011), the court reminded the respondent that "…the statute clearly conveys the message the if [respondent] knew that its employee was suffering from an injury and refused or neglected to provide medical services to address that injury, *the employee was permitted to provide his or her own doctor at [the respondent's] expense*."

The court found that the claimant in this case gave notice when the injury occurred, less than a month later when his attorney filed an application for a preliminary hearing, again when

his attorney filed for a preliminary hearing a month after that, and again about a month and a half later when they again applied for a preliminary hearing. The court held that the claimant waited a month and a half for surgery, and found that the statute did not require the claimant to wait further. The respondent did not cite authority to the contrary, and past medical benefits were upheld.

Guzzo v. Heartland Plant Innovations, No. 121,811, 2021 Kan. App. Unpub. LEXIS 415, 2021 WL 3402264 (Kan. App. July 16, 2021) (unpublished opinion).

Guzzo was working for Heartland Plant Innovations separating planter pots by slamming them individually against a steel table to separate them. She did this to several thousand pots in several hours, and her wrist began to hurt and swell. She ended up having surgery and was released with ratings under the 4th and 6th Editions of the *AMA Guides.* She argued that the 4th Edition should apply, and cited the Court of Appeals decision in *Johnson v. U.S. Foods Service*, 56 Kan. App. 2d 232, 257, 427 P.3d 996 (2018).

When the claimant appealed to the Board, *Johnson* had not yet been decided. At oral arguments before the Board, the parties were asked whether they wished to stay the proceedings until the Supreme Court rendered a decision in *Johnson*, even though neither party formally requested one. Claimant agreed, the respondent did not. Ultimately, the Board found they lacked authority to issue a stay under K.S.A. 77-616(a) and K.S.A. 44-556(b), although one member dissented in the opinion. Claimant appealed.

First, the court found that because the claimant failed to formally request a stay, she failed to preserve the issue, citing *Trapp v. Ferrell Construction Co.* No. 95,004, 2006 WL 2337249 (Kan. App. 2003) (unpublished opinion). Although one Board member had asked during the arguments whether the parties wanted a stay, the court noted that the Board should not raise nonjurisdictional substantive issues *sua sponte.* Because the claimant had not formally requested a stay, the court found the issue was not preserved for appeal.

Second, the court found that even if the stay was preserved, failure to do so amounted to harmless error after the decision by the Supreme Court in *Johnson II*. Claimant also argued that the use of the 6th Edition was unconstitutional because it is not an adequate remedy as required by Section 18 of the Kansas Constitution Bill of Rights. This argument failed and found *Johnson II* to be dispositive on the issue, but referred specifically to the language requiring the 6th Edition to be used as a "starting point," which remains a point of contention as it relates to scheduled injuries.

Last, the Court examined whether there was substantial evidence to support the Board's finding that the claimant suffered a 6% impairment to the wrist. Ultimately, the court found that proper review had been given to the competing doctor's opinions, and the claimant failed to show that the Board's decision was "…so undermined by cross-examination or other evidence…" that the evidence was insufficient to support it.

The Board decision was affirmed.

Hopkins v. Great Plains Mfg, Inc., No. 121,735, 2021 Kan. App. Unpub. LEXIS 277, 2021 WL 2021502 (Kan. App. May 21, 2021) (unpublished opinion).

Holding: Because Hopkins obtained some benefits under the Act, and still others were recoverable, the Act does not violate Section 18 of the Kansas Bill of Rights. It is, therefore, constitutional.

Facts: On September 14, 2014, a co-worker struck Hopkins in the back with a forklift while both men were at work. Ten years prior to the accident, Hopkins had suffered a back injury, which was treated and became asymptomatic. After the incident with the forklift, Hopkins when to the hospital where he underwent test before he was discharged home with the instruction to follow-up with a physician.

Dr. Jon O'Neal, at the direction of Great Plains, assumed Hopkins' treatment. He prescribed medications, physical therapy, and an MRI. The MRI revealed evidence of degeneration in claimant's spine.

Hopkins, at his attorney's direction, saw Dr. George Fluter. Following his evaluation, Dr. Fluter diagnosed many conditions in Hopkins' spine. He concluded Hopkins' workplace accident was the prevailing factor for these conditions. He recommended additional care for Hopkins.

The ALJ in the matter ordered a court-ordered IME with Dr. David Hufford. As part of his examination, he reviewed the MRI ordered by Dr. O'Neal and a prior 2006 MRI. The MRIs were nearly identical. Thus, he determined Hopkins' pain complaints were the result of an aggravation of a pre-existing, degenerative condition. Hence, Hopkins' accident with the forklift was not the prevailing factor.

In response, Hopkins filed a civil suit against Great Plains. Citing the exclusive remedy statute, Great Plains filed a motion to dismiss for failure to state a claim. Prior to ruling, the district court stayed proceedings, pending the resolution of the workers compensation case.

Following a preliminary hearing and a regular hearing, the ALJ issued an award. In it, the ALJ ruled Hopkins suffered a strain of his back, but failed to show the accident caused any permanent injury or impairment. Consequently, the Award limited Hopkins to the benefits already provided, nothing more. Hopkins appealed, but the Board affirmed the ALJ's award.

After entry of the Award, the parties filed Stipulated Facts with the district court. Great Plains then filed a motion for summary judgment. Hopkins responded, arguing as his ongoing complaints and impairment were not compensable under the Kansas Workers Compensation Act, he had been unconstitutionally deprived a remedy as guaranteed by the Kansas Bill of Rights.

The district court granted Great Plains motion for summary judgment. In its journal entry, the court observed Hopkins' failure to recover on his entire claim versus only part of his claim did not render the Act unconstitutional. His ability to recover some benefits and the possibility of recovering additional benefits indicated an adequate remedy existed. Therefore, his constitutional argument must fail.

Issue: Was dismissal of Hopkins' Petition based upon the exclusive remedy proper, when Hopkins could not recover all the benefits he sought for his workplace injury?

Analysis: While Hopkins sustained a prior injury and provision of the Act precluded an award of benefits when the workplace accident was not the prevailing factor for the claimant's injury or need for impairment, Hopkins could have recovered medical treatment (present and future) and impairment **if** he had established his need for these benefits was due to his 2014 injury, not a prior injury. He failed to satisfy this evidentiary requirement. Hence, he was denied these benefits, not as a matter of law, but due to a lack of evidence. Moreover, the Court noted Hopkins recovered some benefits under the Act, just not as much as he would have liked.

Regarding Hopkins arguments about Section 18, the Court of Appeals acknowledged the 2011 amendments made it harder to recover benefits for an aggravation injury. Despite the heightened requirements, a claimant can still recover under the Act for an aggravation of pre-existing condition, if the workplace accident is the prevailing factor. A remedy is therefore available. There is a difference between available and obtained. A claimant may not obtain a remedy, and statute still be constitutional. It is only constitutional when the remedy is not recoverable.

APPLICATION OF K.S.A. 44-523(f)

Ocon v. Seaboard Corp., No. 121,977, 2020 Kan. App. Unpub. LEXIS 703, 2020 WL 6243366 (Kan. App. October 23, 2020) (unpublished opinion).

Claimant was injured while working for the Seaboard Corporation in late 2014. He sought and received medical evaluations in late 2014. His attorney filed an application for a hearing on Friday, May 1, 2015. There were several preliminary hearings, but the case had not proceeded to a regular hearing, settlement hearing, or an agreed award by May 3, 2018. On that date at 3:43 PM, the attorney faxed a motion for extension to the agency. The respondent filed a motion to dismiss based on a failure to prosecute as defined in K.S.A. 2019 Supp. 44-523(f)(1). It was granted by the ALJ without a review of the underlying cause supporting it on the grounds that it was not filed timely. The Board affirmed and the Claimant appealed.

The parties agreed that the operation of K.S.A. 2019 Supp. 44-523(f)(1) worked to bar a request for an extension if the request was not timely filed within the three years provided. First, using language from K.A.R. 51-17-2(g)(6), the claimant argued that the application for a hearing should have been considered filed on the next business day (which would have been Monday, May 4). The Court pointed out that K.A.R. 51-17-2(g) governed service on the parties, and not filings with the agency and that specifically K.A.R. 51-17-2(g)(6) deferred service to the 'next day' and not the 'next business day' as advanced by the claimant.

Second, claimant advanced the argument that the time requirement of filing an application for hearing under K.S.A. 44-534(b) were in conflict with the time limitations in K.S.A. 44-523(f)(1). The Court found that these functioned altogether independently, and the lack of interplay between them, do not call into question the affirmation of the Order for dismissal upheld by the Board. Although, the Court does not address the issue, the Claimant advanced an argument wherein he could file a new application for a hearing within the timelines allowed by K.S.A. 44-534(b).

Last, Claimant attacked the constitutionality of the Act arguing that K.S.A. 44-523(f)(1) diminished the claimant's rights without receiving any offsetting benefit for the time reduction, rendering the change unconstitutional under Section 18 of the Kansas Bill of Rights. Here, the Court stated that the "…constitutional comparison looks at the overall effect of the Act…" and that "…Section 18 rights would be implicated only if amendments to the Act so altered the entire scheme that it no longer provided an adequate substitute remedy…" Ultimately it held that this change did not tip the constitutional balance.

SUBROGATION CREDITS

Hawkins v. Southwest KS Co-op Serv., 313 Kan. 100, 484 P.3d 236 (2021)

Holding: A respondent is entitled to a credit against any third-party recovery a claimant actually receives, reduced by the employer's percentage of fault as determined by a jury's apportionment of fault. Furthermore, the respondent is entitled to a credit against the payment of future workers compensation benefits equal to any payments for damages the claimant receives after the date of recovery.

Facts: Hawkins sustained significant injuries when he fell from a "man-basket" suspended 65 feet in the air, because the hydraulics on a boom crane failed. He received workers compensation benefits, including a voluntary award of permanent total disability benefits.

Hawkins sued three entities for negligence: JLG Industries, Western Steel and Automation, Inc., and United Rental Northwest. Western Steel settled for $925,000.00. These proceeds were designated as damages for loss of consortium and loss of services of a spouse. JLG Industries paid $1.5 million for economic and non-economic damages in 20 installments of $75,000.00.

The claim against United Rentals went to a trial. The jury verdict did not provide Hawkins with additional collectable damages, but it apportioned fault. The jury concluded Hawkins suffered $4,081,916.50 in damages. It apportioned $1,580,476.50 to Hawkins' past and future economic losses. It attributed fault 75% to Western Steel (who had already settled) and 25% to Southwest KS Co-op (respondent).

After the jury verdict, Southwest sought a declaration of its subrogation rights, as provided by K.S.A. 44-504, from the ALJ in Hawkins workers compensation case. The parties agreed Southwest and Travelers had paid $852,460.34 in medical and indemnity benefits. They disagreed about application of K.S.A. 44-504 in light of the jury's apportionment of benefits and fault.

The ALJ used only the $1.5 million settlement paid by JLG. She multiplied this amount by 25% [the percentage of fault attributed to Southwest] and deducted the product from the $852,460.34 paid by Southwest. Afterward, she concluded Southwest was entitled to a subrogation lien of $477,460.34 against benefits paid and $272,539.66 against future benefits paid. On appeal, the Board affirmed.

Issue: 1) Was the Board's use of the jury's determination of fault appropriate, when it calculated the reduction in Southwest's subrogation lien?

Analysis: 1) The Board properly used the jury's finding of fault. K.S.A. 44-504(b) requires a reduction for the employer's portion of fault, but it is silent on how to determine the fault. In this case, the jury's finding constituted substantial competent evidence. Therefore, reliance upon it was appropriate.

2) The extent of Southwest's lien should be calculated based upon the amount of damages Hawkins actually recovered, not what the jury awarded. Southwest's 25% of fault should be deducted from the $1.5 million received from JLG.

3) The future payments referenced to in K.S.A. 44-504(b) refers to payments made after the date of the recovery. Hence, Southwest is entitled to a credit against the payment of future workers compensation benefits equal to any damage payments Hawkins receives under the JLP settlement.

STATUTORY EMPLOYER

White v. RGV Pizza Hut and Argonaute Ins. Co., No. 122,239, 2021 Kan. App. Unpub. LEXIS 343, 2021 WL 2387963 (Kan. App. June 11, 2021) (unpublished opinion).

RGV Pizza Hut operates 45 restaurants in Texas. Under the franchise agreement with Pizza Hut, RGV must run the restaurants in conformity with detailed rules governing product preparation, layout, and appearance. It also requires RGV to keep roofs of the restaurants in good repair and specifies what color the roofs must be painted. RGV has no restaurants in Kansas and does not otherwise extensively conduct business in the state. It contracted with Shomberg with some regularity to clean, repair and paint the roofs on its restaurants. Because this is done on pitched roofs, this work comes with the risk of injury. RGV does not own the equipment necessary to do the work on the roofs.

The claimant was an employee of Shomberg for the purposes of the appeal, and that relationship was not in dispute before the court. The claimant, the owner of Shomberg, and another employee went to Texas to do work for RGV when the claimant fell and seriously injured his leg. Shomberg was not available as a source of workers compensation coverage and was dismissed from the claim. The principal issue is whether RGV could be substituted for Shomberg as a statutory employer.

The Board found that RGV was the statutory employer for the purposes of coverage under the Kansas Workers Compensation Act, and RGV appealed. The Board found that the contractual obligation RGV had to Pizza Hut of maintaining the roofs made it an obligation of RGV, who then subcontracted it to Shomberg, but the court discounted that reasoning. The court then turned to the two-factor test articulated in *Hanna v. CRA, Inc., 196 Kan. 156, 409 P.2d 786* (1966), endorsed by *Bright v. Cargill, Inc.,* 251 Kan. 387, 837 P.2d 348 (1992). The test is 1) whether the subcontracted work is inherent in and an integral part of its trade or business; and 2) the subcontracted work "ordinarily [would] have been done by [its] employees." In this case, they agreed that the second criterion did not apply to RGV.

RGV argued that it was in the business of making pizzas, with or without the franchise agreement, and therefore the painting of the roofs cannot be so essential as to render it a statutory employer. The court disagreed, stating RGV was not in the business of selling pizzas, but in the business of selling *Pizza Hut* pizzas. The "deliberate and exhaustive" homogeneity invites people in that are familiar with Pizza Hut to their business. Therefore, the exacting requirements of such homogeneity are an integral part of making it a Pizza Hut.

RGV also advanced an argument that there was no personal jurisdiction because it lacks sufficient minimal contacts with Kansas to be held to answer in a judicial proceeding in the state under the Due Process Clause. The court found that there was a contractual relationship between Shomberg that RGV had sought out, and the claimant's injury was plainly related to that contractual relationship. RGV did not require that Shomberg show that he had valid workers compensation insurance. RGV sought out Shomberg for the job, which was substantial and bore the risk of physical injury, something RGV knew or should have known. Because of this, minimum contacts with Kansas were established.

Last, White filed a 44-523(f) motion for extension that was granted for good cause shown. RGV asserted that this motion was not erred in finding good cause, but the court dismissed this outright without much argument. Second, RGV advanced that the substantive facts were not proven because the ALJ only relied upon the assertions of White's attorney. RGV's counsel did not object during the proceeding. The Court did not find that this was insufficient, and upheld the 523(f) extension. The opinion of the Board was affirmed and remanded for proceedings consistent with its opinion.

PSYCHOLOGICAL INJURIES

Hughes v. City of Hutchinson, No. 121,722, 2020 Kan. App. Unpub. LEXIS 541, 2020 WL 4556772 (Kan. App. Aug. 7, 2020) (unpublished opinion).

Holding: The claimant's depression was not a compensable work-related condition.

Facts: Claimant was injured while working as an equipment operator for the City of Hutchinson. The city admits he suffered an injury and timely reported it. Following a medical examination of his left shoulder, the claimant received physical therapy and regular follow-up visits with his doctor.

In June 2016, Hughes filed a formal workers compensation claim. He also began complaining of right shoulder pain and numbness and tingling in both hands. In July 2016, the ALJ ordered an independent medical evaluation with a second doctor who found that claimant's left shoulder injury was a result of his work accident, but his right shoulder injury and numbness and tingling in his hands were unrelated to his work accident.

In February 2018, claimant's attorney arranged for a clinical psychologist, Dr. Barnett, to evaluate claimant. Dr. Barnett testified that claimant has ongoing restrictions, chronic pain, poor sleep, and morbid obesity and was probably unemployable. He further stated that claimant had not sought job service assistance or vocational rehabilitation, concluding that claimant was not engaging in a good-faith effort to find employment.

Another psychologist, Dr. Allen met with claimant to evaluate him and found that he suffered from a major depressive disorder connected to his work injury, but also found that he had other stressors including his son dying. Dr. Allen assigned whole-body impairment of 10% and found that claimant had not reached maximum medical improvement. However, with counseling and medication, his impairment rating could be reduced or completely eliminated.

Following a hearing, the ALJ issued an award, finding claimant had 13% impairment to his left shoulder but did not have any work-related impairment to his right shoulder. The ALJ found Dr. Steffan's opinion that claimant did not suffer from work-related depression the most credible opinion. Claimant appeal asserting the ALJ erred in determining the nature and extent of his disability. The Board affirmed the ALJ's award.

Issue: Is the claimant's depression a result of his work-related injury?

Analysis: The Court of Appeals held there was enough substantial evidence to reverse the Board's decision, finding that the claimant did not sustain a psychological injury, because 1) the worker's hired psychologist was the sole professional to diagnose the worker with depression; 2) expressed concern Hughes did not seek opinions from treating medical professionals concerning depression; 3) the worker only consulted his hired psychologist 29 months after his injury and only based on his attorney's request; 4) the worker did not seek a preliminary hearing to request court-ordered mental health treatment while the matter was pending; and 5) the worker did not testify before the ALJ regarding his claims for depression and anxiety.

APPELLATE REVIEW

Pile v. Textron Aviation, Inc., No. 122,572, 2021 Kan. App. Unpub. LEXIS 427, 2021 WL 3124157 (Kan. App. July 23, 2021) (unpublished opinion).

The claimant worked for the respondent in a position that required using power tools, including a hand-held grinder and oscillating orbital sander, on a regular basis. In June of 2015, the claimant complained of pain in his right hand, and to a lesser extent, pain in his left hand. A nerve conduction test revealed bilateral carpal tunnel syndrome, mild on the left and moderate on the right. This was treated with surgery on the right and conservative treatment on the left. Ultimately, the claimant was given a 3% impairment to the right wrist and no impairment to the left wrist in May of 2016.

Claimant continued to have symptoms, as a result he was sent to Dr. Fevurly in June of 2017, who opined he needed additional treatment. Dr. Melhorn diagnosed the claimant with mild to moderate CTS symptoms in his right and left upper extremity, and claimant turned down additional surgeries. He was rated by Melhorn as having a 2% to the right upper extremity and no impairment to the left. Claimant was then seen by Dr. Murati twice, who eventually gave the opinion that the claimant suffered an 8% impairment to each upper extremity, but noted that the 4th Edition would render higher ratings.

The claimant was sent to Dr. Tilghman who gave the opinion that the claimant suffered a 5% impairment to the right upper extremity, but gave no opinion on the left upper extremity. The ALJ awarded a 5% right upper extremity impairment, noting mild carpal tunnel on the left, but assessing no ratable impairment. Pile appealed. After review, the Board found the claimant suffered a 7% right upper extremity impairment and a 4% left upper extremity impairment. Respondent appealed, claimant cross-appealed.

Respondent asserted that the award from the Board is not supported by substantial competent evidence, specifically that the impairment to the left upper extremity was inappropriate. The court found that the Board had conducted a thorough review of the evidence, essentially citing the entirety of the Board's medical review in its decision. Specifically, the Board noted that Dr. Gwyn had treated the left carpal tunnel syndrome after diagnosing it, albeit conservatively. It also pointed out that Dr. Melhorn had diagnosed the left CTS, but gave it no impairment. Therefore, an average of the 0% and the 8% from Dr. Murati was appropriate. The Board declined to reweigh the evidence and affirmed the Board's impairment findings.

The claimant also advanced a constitutional argument based upon the holding of *Johnson II*, but the court declined to address the issue. Specifically, the court found that no issues were raised in the claimant's case that were not already decided in *Johnson II*, which was decided mere months before this decision. Therefore, the constitutional argument was rejected.

Frank v. W.E.B. Enterprises, LLC, No. 122,378, 2021 Kan. App. Unpub. LEXIS 227, 2021 WL 1589245 (Kan. App. Apr. 23, 2021) (unpublished opinion).

Holding: The Court of Appeals does not have grounds to overturn the Board's decision if the Board reverses the ALJ and gives reasons for disagreeing with the ALJ's decision supported by substantial evidence.

Facts: Claimant fell off a ladder hanging Christmas lights on a house while working for his friend, Keith. Claimant sought workers compensation benefits for his injuries.

At the time of the accident, claimant believed he was working for Keith's company called Home of the Green Team, because he had previously worked for them to mow lawns and hang Christmas lights. Keith was also involved in a several other businesses, including W.E.B. Enterprises, LLC.

During the ALJ's preliminary hearing, it was disputed whether claimant was working for Seasonal Lighting, Home of the Green Team, or W.E.B. Enterprises, LLC. Keith testified that claimant was working for Seasonal Lighting, and that Home of the Green Team and Seasonal Lighting were d/b/a's for W.E.B. Enterprises.

The ALJ found that W.E.B. was an umbrella limited liability company and that Seasonal Lighting and Home of the Green Team were names the LLC used. Therefore, claimant was working for W.E.B. at the time of the accident. The ALJ found that Kansas Workers Compensation Fund was liable to pay the benefits because W.E.B. did not carry workers compensation insurance. The Fund appealed to the Board. The Board found that Seasonal Lighting is the entity the claimant was working for when he was injured and that the only link between Seasonal Lighting and W.E.B. is that Keith is involved in both. The Board found that Seasonal Lighting's payroll did not meet the amount required for coverage under the Act and therefore denied claimant's claim for benefits. Claimant appealed.

Issue: Can the Court of Appeals overturn the Board's order?

Analysis: The Board based its decision on deposition testimony concerning the nature and relationships of the business operations and gave specific reasons for disagreeing with the ALJ's finding. The Court of Appeals does not reweigh evidence and therefore is unable to overturn the Board's decision.

Jennings v. T Rowe Pipe, LLC, No. 122,149, 2020 Kan. App. Unpub. LEXIS 759, 2020 WL 6533123 (Kan. App. Nov. 6, 2020) (unpublished opinion).

Holding: There is substantial competent evidence in the record to support the Board's award of $400.00 to claimant for unauthorized medical expenses.

Facts: While working for T Rowe Pipe, LLC, in 2015, claimant went into a trench in a confined area to test pipe, when he sat up, he heard a loud pop and felt pain on his left side. Co-workers had to help claimant get up and took him to the hospital a few hours later when his pain had not dissipated. There, x-rays of claimant were taken which showed no acute injury. Six years prior to this incident, claimant had been diagnosed with sarcoidosis, an inflammatory disease that affects bones. Over the course of the two years following the work-related accident, claimant was examined for his hip pain from multiple doctors. Though the doctors could not determine the cause of claimant's pain, it was recommended he receive a total hip replacement and not return to work.

In March of 2016, Jennings filed a workers compensation claim against T Rowe Pipe. The ALJ appointed Dr. Do to perform an independent medical examination of claimant. The ALJ ultimately concluded that the work-related accident is not the prevailing factor for the claimant's injury and denied claimant's request for compensation benefits.

Claimant filed a timely application for review to the Board who agreed with the ALJ's ruling but modified the award to reimburse claimant for unauthorized medical expenses in the amount of $400.00. Claimant filed a timely petition for judicial review to the Kansas Court of Appeals.

Issue: 1. Whether the Board erred as a matter of law by relying on medical testimony that allegedly applied an incorrect causation standard. 2. Whether the Board erred as a matter of law when it concluded that Jennings' injury was only temporary in nature.

Analysis: The court reviewed the Board's factual findings in light of the record as a whole and determined the Board's findings were supported by substantial competent evidence because the Board's decision was not so undermined by cross-examination or other evidence that the evidence was insufficient to support the Board's decision.

The court also found that there is substantial evidence to support the Board's finding that Jennings suffered a temporary injury during the work-related accident because there is evidence that the claimant heard a pop, he was taken to the hospital, and was given a shot of Toradol for pain and a steroid injection to help reduce the swelling. As such, the court affirmed the Board's findings.

Langvardt v. Innovative Livestock Servs. & Kan. Livestock Ass'n, No. 122,188, 2020 Kan. App. Unpub. LEXIS 755, 2020 WL 6533264 (Kan. App. Nov. 6, 2020) (unpublished opinion).

The Claimant suffered a bilateral upper extremity injury on October 15, 2018. He was treated by Dr. Estivo and released on January 11, 2019 with a rating issued on March 18, 2019. The rating gave a 10% impairment rating to the left upper extremity and a 4% impairment to the right upper extremity. A settlement hearing was held telephonically on May 17, 2019 wherein the claimant and the respondent agreed to $20,512.50 to close all issues. Within 24 hours of the hearing, the claimant informed the respondent company that he did not want to accept the settlement. Claimant retained counsel on May 24, 2019.

After hearing arguments from both parties, the Board issued an Order stating that the settlement was not in the best interest of the claimant for three reasons: 1) the Claimant may be entitled to a work disability based on a BAW impairment of 8%, 2) the monetary value offered was less than the value of the BAW claim, and 3) the fact that the claimant was still in the hospital when he did the settlement hearing should have raised red flags and the ALJ should have looked into why he was hospitalized and if it affected his judgment. The Board also found that no payment had been made to complete the settlement, and stated that the case was to be "assigned to an ALJ for further proceedings." Respondent petitioned for review.

The Court of Appeals issued a show cause order questioning whether the Order from the Board constituted a nonfinal agency action that was not ripe for appeal. Respondent argued that the appeal is a final decision on the controversy between the parties, i.e., the validity of the settlement. In support for his case, the claimant cited *Grajeda v. Aramark Corp.* 35 Kan.App.2d 598, 598-599. 132 P.3d 966 (2006) (the Board remanded a case back to the ALJ for further proceedings and the court found that an appeal was premature), and *Williams v. General Electric Company*, 27 Kan.App.2d 792, 793, 9 P.3d 1267 (1999) (in which the court found an appeal from an order of remand to an ALJ for additional findings of fact to be premature).

In the end, the court found that a remand to conduct further findings of fact is an agency determination that the Board intends to be preliminary, and an appeal from such an order is asking the court to bring an interlocutory action on a nonfinal agency action. The court declined to do so. However, in dicta, it noted that had the Board upheld the settlement, such a decision would have been a final decision and subject to review. The appeal was dismissed without prejudice.

WORK DISABILITY

Rickson v. Kerns Constr., Inc., No. 122,092, 2020 Kan. App. Unpub. LEXIS 602, 2020 WL 5268162 (Kan. App. Sep. 4, 2020) (unpublished opinion).

Holding: When employees voluntarily give an employer notice of a specific date on which they intend to resign but are terminated before that date, they are due work disability for up to, but not after, that date.

Facts: In June 2017, claimant slipped and hit his head on the top of his work van's door. He cut his head and neck. In October 2014, claimant's coworker told him that the supervisors were accusing claimant of spending too much time on the phone, asking them to cover for him, and stealing materials from the job site. The claimant claims he was fired at that time; however, his employer claims he gave his supervisor his two weeks' notice.

After his employment ended, the claimant continued to treat for his neck injuries and underwent surgery in September of 2016. Following surgery, claimant continued to have pain and was restricted from lifting more than 50 pounds or doing overhead activities. The claimant received workers' compensation benefits, but he claimed he was underpaid for temporary total benefits and sought payment of medical bills and interest.

Issue: Does an employee putting in his two weeks' notice prior to a work-related injury affect his ability to recover wage loss compensation?

The ALJ finding: The ALJ awarded the claimant 6.71 weeks of temporary total disability compensation for a 16% functional disability, 66.40 weeks of PPD benefits, and payment of medical expenses, which included current and future expenses for pain management. The ALJ denied work disability, finding that because claimant quit his job, he did not suffer wage loss. Additionally, the ALJ found that claimant was not entitled to more weeks of temporary total benefits because his employer would have accommodated claimant's work restrictions had claimant not quit. The ALJ denied claimant's request for interest under K.S.A. 44-512b.

The Board's finding: The Board reversed the ALJ's decision finding because it was not clear if claimant quit or was fired, and the employer would not have provided claimant accommodated work that fit claimant's restrictions. Employer appealed and challenged only the award of work disability as defined in K.S.A. 2019 Supp. 44-510e.

Analysis: The Court of Appeals affirmed that Board's finding that the claimant was terminated without cause and reserved the Board's finding that the claimant did not voluntarily resign. Prior case law holds that when employees voluntarily give an employer notice of a date certain on which they intend to resign yet are terminated before that date, they are due unemployment benefits up to, but not after, that date. The Court found that the same is true in workers compensation cases.

As such, the Court remanded the case with directions for the Board to determine, from the totality of the circumstances, whether the claimant's notice of his two weeks was voluntary. If so, he can only receive two weeks of work disability.

Williams v. Wellco Tank Trucks, No. 123,114, 2021 Kan. App. Unpub. LEXIS 425, 2021 WL 3124056 (Kan. App. July 23, 2021) (unpublished opinion).

Claimant was injured while securing a locomotive engine onto the flat bed of his truck and was sent to receive medical treatment. Although initially diagnosed with a bicep tendon tear, he eventually underwent a cervical fusion and was released from care with restrictions that resulted in his termination from the respondent's employment. It was found that the claimant had an average weekly wage of $745.45.

Ultimately, doctors assigned the claimant a 25% body as a whole impairment underneath the 6th Edition of the Guides, allowing him to seek ongoing disability payments if his wage loss was greater than 10% of his pre-injury average weekly wage. The case focused on this wage loss.

Following his termination from the respondent, the claimant secured employment with another company, Long Trucking, who hired him strictly as a driver for $16 per hour. However, the work varied according to the season and weather, meaning some weeks he did not work at all and others he worked at least 40 hours. In 2019, the claimant and other employees of Long Trucking assisted with natural disaster relief in Missouri for 11 days. This paid a higher rate of pay for the employees that assisted, because it was a federal contract. Claimant was paid $30 an hour, $45 per hour overtime, and $60 per hour on holidays. The claimant testified that it was "not uncommon…to work on federal contracts with higher rates of pay, but this was the only one they had ever been called out that dealt with a natural disaster."

Ultimately, the total pay earned over the course of the 74 weeks that he worked for Long Trucking would result in a 9% wage loss. If they excluded the federal contract work, he would have suffered a 14% wage loss. The ALJ found that the claimant had not suffered a wage loss, specifically noting that the last 26 weeks would result in an average weekly wage of $744, even without the outlier federal contract pay, and found that the claimant did not overcome the burden of showing that his actual earnings constituted his earnings capacity. The Board found they lacked authority to exclude the federal pay from their calculations, and further found that if they imputed the claimant's normal pay ($16 an hour) to the hours worked on the federal contract, it would result in a 9% wage loss, insufficient to pursue a work disability. The claimant appealed.

First, the court found that the language of K.S.A. 44-510e(a)(2)(E) was unambiguous when it defined wage loss based upon the post-2011 definition in the statute requiring an analysis into the claimant's post-injury earning *capacity.* It found that neither the respondent nor the claimant pointed to any specific ambiguity in the statute, so the analysis turned to whether the Board erred in their decision that the claimant failed to rebut this presumption.

Second, the claimant argued that the position with Long Trucking was not a true accommodation because the position did not exist in the open labor market. However, the facts of the case indicated that there was no pre-existing relationship between the owner of Long Trucking and the claimant, the claimant had been hired without a pre-existing relationship, and the claimant had been hired with full knowledge of his restrictions. Because of this, the argument failed.

Third, the claimant asserted that the Board only discussed the federal paychecks in the context of declining to cherry-pick the claimant's actual earnings. The claimant asserted that the court could ignore the decision in *Graham v. Dokter Trucking Group*, 284 Kan. 547, 558, 161 P.3d 695 (2007), as it was decided before the 2011 Amendments to the KWCA. However, the court found that while the definition of wages may have changed, the definition of wage loss when wages are actually available has not significantly changed. Therefore, the *Graham* decision is still good precedent and the court still disapproves of cherry picking to establish post-injury wage loss.

Last, the claimant argued that he had overcome the presumption of wage loss by showing that his actual earnings exceeded his earning capacity based on the two federal 'outlier' paychecks. The Board found that while the disaster relief work may have been unusual, it was still federal contract work that the claimant and his co-workers performed with some regularity, as testified to by the claimant. Though the work that the claimant had performed during the disaster relief stint had been somewhat accommodated, it was the same work that the claimant was performing for Long Trucking currently. The court found substantial evidence to find that the claimant did not suffer a wage loss of more than 10% of his average weekly wage. The Board decision was affirmed.

DRUG TEST

Woessner v. Labor Max Staffing, 312 Kan. 36, 471 P.3d 1 (2020).

The claimant died after falling 15 feet from a jobsite catwalk for no apparent reason. He passed away approximately 6 months later. Initially, urine was drawn from a catheter at the hospital where he was initially admitted. The toxicology screen indicated his marijuana metabolite levels were above 50 ng/ml. GC/MS confirmatory testing later revealed it to be at 189 ng/ml, over the limit for the conclusive presumption of impairment, which is 15 ng/ml. The respondent then denied the claim.

There were two Exhibits presented at the regular hearing relevant to the appeal, and both were "chain of custody" affidavits. One was from the treating hospital's laboratory services director, and the other was from the GC/MS testing facility's laboratory supervisor. Both had certain supporting documents purporting to show the full chain of custody at each facility. Claimant objected on hearsay and foundation, but the ALJ allowed them into evidence.

The expert witness for the respondent testified that the active ingredient in THC was not what the laboratory tests measured, and could not provide any testimony as to the claimant's level of impairment. The claimant's co-worker testified that he had seen the claimant cleaning the catwalk on the day of the accident, and had spent 10-15 minutes near him right before the fall. The co-worker testified the claimant had acted normal during the time they spent together.

The issues on appeal were 1) whether the drug testing was admissible and 2) whether clear and convincing evidence demonstrated drug impairment had not contributed to the accident. The admissibility of the drug test was challenged under K.S.A. 44-501(b)(3), K.A.R. 51-3-5a, and the general evidentiary rules for workers compensation hearings.

The Court first examined K.S.A. 44-501(b). Subsection (b)(2)(B) allows for the admission of the results of a chemical test if performed during an autopsy or in the normal course of medical treatment related to the health and welfare of the injured worker. Subsection (b)(3) will invoke additional criteria that needs to be met on "results of a chemical test performed on a sample collected by an employer." The Court found that K.S.A. 44-501(b)(3) did not exclude the sample, as the condition precedent necessary to 'activate' the foundational requirements of subsection (b)(3) is that the sample must be collected by the employer. The Court reasoned that in this case the hospital personnel collected the sample, not the employer. Therefore, subsection (b)(3) did not apply.

The Court then examined the language of K.A.R 51-3-5a, which governs the admissibility of medical evidence at preliminary hearings. Specifically, the regulation states that even though medical records shall be considered at preliminary hearings, "…the reports shall not be considered as evidence when the administrative law judge makes a final award in the case, unless all parties stipulate to the reports, records, or statements or unless the report, record, or statement is later supported by the testimony of the *physician, surgeon, or other person making the report, record, or statement*." The Court agreed with the lower court that the test result was "not a report, record, or statement" within the regulation's meaning and 2) since there was no preliminary hearing, the regulation's requirement for testimony to "later support" such evidence does not apply.

The Court states that the regulation is meant to mirror K.S.A. 44-519, which limits the application of the regulation to "a person who would typically issue a report, record, or statement about a medical examination," which, because of the language *physician, surgeon, or other person making the report* "…indicates the promulgating authority must have intended the phrase "or other person making the report, record, or statement" to refer to people similar to physicians or surgeons—in other words, a person who would make a "report of any examination of any employee by a health care provider."

This seems odd in a case that in the section prior cited "When a statute is plain and unambiguous, a court must give effect to its express language, rather than determine what the law should or should not be." *Estate of Graber v. Dillon Companies*, 309 Kan. 509, 516, 439 P.3d 291 (2019) and "…[a]s with statutes, the court must give effect to the intent expressed by the plain and unambiguous language in the regulation." *Pener*, 305 Kan. at 1208, but I digress.

The Court also found that because there was no preliminary hearing the language of the statute does not apply. Agreeing with the lower court, it found that the language of the statute "reasonably applies only to documents that were first presented at a preliminary hearing without the required testimony" and not to those which are first presented at a regular hearing.

Last, the Court examined the general rules of evidence. The Court found that the Board had abused its discretion in excluding the lab test because testimony and affidavits about the sample's chain of custody in this matter contained 'significant indica of reliability' to make them admissible. The Court noted that hearsay is generally admissible in workers compensation proceedings and relied upon the affidavit of the LabCorp laboratory supervisor, who did not testify in the case. In the end, the lab tests were found to be admissible.

However, in the end, the testimony of the co-worker that worked alongside the claimant just prior to the accident and the admission of the respondent's expert that he could not give an opinion on the level of impairment were enough to overcome the presumption that the impairment contributed to the accident and the claimant's widow was awarded death benefits under the Kansas Workers Compensation Act.

HEART AMENDMENT

Larson v. Excel Indus., 59 Kan. App. 2d 583, 483 P.3d 1067 (2021).

Claimant suffered a fatal heart attack after returning home from an out-of-town business trip in November 2016. He was 61 years old and employed as a senior quality engineer, a position that required frequent domestic travel. He previously suffered a heart attack while traveling for work in Chicago at a Cubs game in 2016. While he was in the hospital, he contacted his boss and told him that he no longer wished to travel. His boss said he would no longer require travel.

Claimant returned to Wichita and returned to work on September 20, 2016. Upon his return, his boss was no longer employed, and he was told he had to continue to travel domestically for his job. He was assigned a multi-city trip through Iowa and Minnesota accompanied by another from November 15 to 17 of 2016. Claimant was on medications, and brought enough to last through November 17th. However, weather delays pushed their arrival home until 10:00 pm on November 18. The claimant had a heart attack at the airport in Wichita and died the next day at the hospital.

The other employee testified that there was nothing unusual about the trip. There was conflicting testimony presented about whether the business trip was the prevailing factor in causing the second heart attack. The ALJ denied the claim, and the Board affirmed. The widow sought review alleging 1) the Board had incorrectly interpreted the meaning of the heart amendment; 2) substantial evidence did not support the Board's findings that claimant was engaged in usual exertion and 3) the Board erred when it declared claimant's death was caused by external forces as moot.

First, the Court of Appeals found that the heart amendment does not contain a definition of the usual or day-to-day work of the claimant and it will generally depend on a number of facts and circumstances, among which is the daily activities of the worker (*citing Nichols v. Kansas State Highway Commission*, 211 Kan. 919, 925, 508 P.2d 856 (1973). Here, the Court of Appeals found that the analysis done by the Board was sufficient to show that the Board did not misinterpret the statute.

Second, the Board looked to whether substantial evidence supported the finding that the claimant was involved in the usual exertion created by his employment. The standard for determining what is the usual exertion is the work history of the individual involved. *Mudd v. Neosho Medical Center*, 275 Kan. 187, 191, 62 P.3d 236 (2006). The Court agreed that despite the phone call after the Cubs game, the record supported that travel was still a normal part of the claimant's job when he returned. Further, using the co-worker's testimony, the Court found that the trip was within the usual course of the claimant's employment.

Last, the Court addressed whether the Board erred when they found that all other issues were moot when the rendered its decision. The widow argued that external forces had caused the claimant's heart attack, and on appeal had argued that if so then the amendment would not apply, and she would be entitled to benefits. In order to do so, the claimant must show 1) the presence

of a substantial external force in the working environment and 2) there must be expert medical testimony that the external force was a substantial causative factor in producing the injury and resulting disability. *Mudd*, Kan. at 193-194. Ultimately, the Court found that the Board had a duty to address the issue and that the ruling on the heart amendment did not render this issue moot.

In the end, the Court upheld the Board's ruling on the heart amendment, but remanded it back to the Board to address the issue of whether an external force was the cause of the heart attack.